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No. 83-1625

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

LYLE GERALD JOHNS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Page

Cases:

Arkansas v. *Sanders*, 442 U.S. 753 ..... 2, 5

Carroll v. *United States*, 267 U.S. 132 7

Oklahoma v. *Castleberry*, cert. granted, No. 83-2126 (Nov. 5, 1984) 5

Segura v. *United States*, No. 82-5298 (July 5, 1984) 9

Texas v. *Brown*, 460 U.S. 730 4

United States v. *Chadwick*, 433 U.S. 1 ..... 1, 2, 5

United States v. *Place*, 462 U.S. 696 9

United States v. *Ross*, 456 U.S. 798 ..... 2, 4, 5, 6, 7, 8

United States v. *Van Leeuwen*, 397 U.S. 249 9

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1. Respondents' primary contention (Br. 10-15) is that the judgment below should be affirmed on a ground unequivocally rejected by the court of appeals — namely, that "the focus of the investigation [here was] on the packages themselves and not on the entirety of the vehicle in which they [were] placed" (Br. 12) and therefore that this case is governed by *United States* v. *Chadwick*, 433 U.S. 1 (1977). The thrust of this argument is that the officers were not permitted to open the bales of marijuana without a warrant even at the time they were first discovered and seized; the delay on which the court of appeals focused is irrelevant to consideration of this contention. The court of appeals correctly found (Pet. App. 8a-9a), however, that this reliance upon *Chadwick* is completely belied by the facts.

As respondents recognize (Br. 10), under *United States* v. *Ross*, 456 U.S. 798 (1982), when police have probable cause to support a warrantless search of an automobile, they are also authorized to search without a warrant any containers or packages found inside that might be repositories of the objects sought. The Court in *Ross*, however, did not disturb the prior holdings in *Chadwick* and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), that a warrant is necessary to search a container when "the police [have] probable cause to seize the suitcase before it [is] placed in the [automobile] and [do] not have probable cause to search the [automobile] itself." 456 U.S. at 812-813 (footnote omitted). In *Chadwick*, agents had probable cause to believe that a footlocker on a train contained narcotics; as soon as the footlocker was placed in the trunk of a car, the agents seized it and later searched it without a warrant. In *Sanders*, police received reliable information that an airplane passenger would arrive carrying a green suitcase containing marijuana. After the passenger arrived at the airport, the suitcase was placed in the trunk of a taxi. The police followed, stopped the taxi after it had driven several blocks, and seized and searched the suitcase. "It is clear * * * that in neither *Chadwick* nor *Sanders* did the police have probable cause to search the vehicle or anything within it except the footlocker in the former case and the green suitcase in the latter." *Ross*, 456 U.S. at 814. This case bears no resemblance in this regard to *Chadwick* and *Sanders*, but rather is squarely controlled by *Ross*.

The investigatory efforts in the early morning hours before respondents' arrest show unmistakably that, while the Customs officers suspected illegal activity, they were not aware of its particulars nor was their attention focused on any particular containers. The investigation was centered on respondents, who were known to be involved in drug smuggling, and surveillance of their suspicious activity was

the primary focus. The suspicion that there was contraband in any specific location did not develop until the officers saw the trucks meet two small planes at the remote Bowie airstrip. Their observations there did not focus suspicion on any containers. In the words of the court below, "[t]he customs officers * * * remained some distance away while [respondents] placed the packages inside the trucks. The officers did not see the packages nor have a chance to seize the contraband until after loading." Pet. App. 8a. Thus, when the officers approached the vehicles on the basis of probable cause to believe they contained contraband, they had not even seen the packages yet and certainly did not have a suspicion focused on anything other than the vehicles. Even after they saw the bales that apparently contained marijuana, the court of appeals correctly found that the officers had "probable cause to search both vehicles, not just the newly-discovered bales. Their suspicion did not focus solely on the packages; it was not obvious that all the contraband would be in the bales. [Respondents] could have easily secreted other drugs elsewhere in the vehicles." *Id.* at 8a-9a.

Respondents' argument appears to be based on the assertion that "the police officers focused their attention exclusively on the packages from the moment they arrived on the scene" (Br. 13).[1] This contention, however, is quite beside

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[1]Respondents also argue (Br. 13-14) that the government's presentation of a "plain view" argument to the court of appeals demonstrates that the focus of the investigation was on the packages, not the automobile. This contention is puzzling. Under the plain view doctrine, officers may seize clearly visible contraband if they are in a place where they have a right to be. (The court of appeals rejected the government's contention that the *contents* of the bales were effectively in plain view, and hence that they could be opened, because the contents could be inferred from the outward appearance of the bales (Pet. App. 4a n.2)). Here, the officers' purpose in approaching the vehicles — at which time they saw the packages — was to search the vehicles on the basis of probable cause. That the officers' attention was attracted by the packages in the course of the search does not in any way suggest that their attention was focused on the packages when the search commenced.

the point. The officers approached the vehicles with probable cause to search them; as they approached, they smelled marijuana and observed the square packages wrapped in trash bags. Quite naturally, their attention "focused" on these newly-discovered packages, but that does not mean that their probable cause to search the rest of the vehicles evaporated. Cf. *Texas* v. *Brown*, 460 U.S. 730, 750 (1983) (Stevens, J., concurring) (observations that justify plain view seizure of container may also establish probable cause to search car and containers found therein).[2]

As this Court noted in *Ross* (456 U.S. at 820), contraband in a car is almost invariably stored in a container; therefore, when officers with probable cause to search a vehicle for contraband approach their task, they will always be expecting to search whatever containers are in the vehicle that could enclose contraband. This does not remove the situation from the purview of *Ross*. Indeed, in *Ross* itself the officers did not expect the heroin to be scattered about the vehicle, and there can be little doubt that the officers' attention focused on the paper bag the moment they opened the trunk of the car. Nevertheless, the officers were not required to procure a warrant in order to search the bag. It is true in

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[2]To bolster their contention that the officers' suspicions were focused on the packages, respondents note (Br. 13) that the record does not indicate that the trucks were searched after their removal from the airport. But there is similarly nothing in the record that indicates that the trucks were not searched; the record is simply silent on the matter, which is not surprising since it is of no particular significance. In any event, common sense suggests that officers who found a substantial quantity of contraband in a truck would be expected to complete a thorough search of the truck whether or not their suspicions were focused on the truck before the contraband was found. Since the trucks were seized and taken back to DEA headquarters (see Resp. Br. 3; 11/9/81 Tr. 129), there is every reason to assume that they were searched.

this case that no extensive search of the car was necessary before the packages were discovered[3] and, moreover, that the external appearance of the packages gave the officers particularly strong reason to believe that they contained contraband.[4] But these aspects of the case do not distinguish it in principle from *Ross*. This is still a case in which officers approached a vehicle in order to search it on the basis of probable cause to believe that the vehicle contained contraband, and on that basis searched without a warrant packages found in the vehicle. The case is not at all analogous to *Chadwick* and *Sanders*, where the officers had probable cause focused exclusively on a particular container before it was placed in a vehicle, and it was mere happenstance that the containers were in a vehicle at the time they were seized.[5]

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[3]Respondents argue (Br. 13) that the trucks were not searched at all before the packages were seen. But this is surely irrelevant given that the officers had probable cause to search the trucks. The situation here is analogous to the one that would have been presented in *Ross* if the paper bag had been visible in the interior of the car as the officers approached, rather than in the trunk; the officers in *Ross* undoubtedly would not have needed to get a warrant in such a case.

[4]Respondents seem to rely on this fact to support their contention that suspicion focused on the packages (see Br. 13). It is undoubtedly true that the officers were fairly certain that the packages contained contraband when they seized them. Indeed, that indirectly accounts for this case reaching this Court; the delay that is the focus of the question presented here (assuming that there was such a delay at all (see U.S. Br. 5 n.2)) is plainly attributable to the fact that the officers had no reason to open packages when they already "knew" — to a reasonable degree of certainty — what was inside. But surely the fact that police suspicion that a package contains contraband transcends probable cause and reaches a level of near certainty cannot be a reason for imposing a warrant requirement simply because that suspicion may have the understandable effect of diverting attention from the rest of the vehicle.

[5]The recent grant of review in *Oklahoma* v. *Castleberry*, cert. granted, No. 83-2126 (Nov. 5, 1984), suggests that the Court may be prepared to reconsider the holdings of *Chadwick* and *Sanders* and to expand the reach of the doctrine enunciated in *Ross*. But, as shown above, respondents' arguments here fail even if the current state of the law is left unchanged by *Castleberry*.

2. Respondents also contend (Br. 15-29) that even if *Ross* did authorize a warrantless search of the packages at the airport, the officers were required to obtain a warrant when they opened the packages three days later (see Br. 39). This contention is a narrow one. Respondents do not dispute that the automobile search doctrine generally permits police to conduct a warrantless search of an automobile at the police station long after it is first secured (see Br. 19, 24). They contend, however, that this rule does not apply to that portion of the automobile search that involves opening a package found in an automobile. According to respondents (Br. 26), the warrantless search of such a package authorized in *Ross* must be performed within at most "a few hours"; after that time a warrant is required to search the package (although not the rest of the automobile). This argument completely misunderstands the import of *Ross*.

In *Ross*, the Court held that the authority to conduct a warrantless search of an automobile based upon probable cause extended to the search of any part of the vehicle, including packages contained inside. Under *Ross*, the search of a package found in an automobile is simply a part of the automobile search itself. Thus, respondents' argument that, after a period of delay, a warrant is required to search a package but not the automobile itself is at odds with *Ross*.

Respondents seek to justify their contention by arguing that the "exigencies" (Br. 23) that permit a warrantless search of a package at the outset no longer justify such a search after a delay. It is true, of course, that there was no exigency here that prevented the officers from getting a warrant when they removed the core samples for testing. But the Court in *Ross* made clear in no uncertain terms that the validity of the warrantless search involved there — both of the automobile and of the package inside — did not depend on any particular exigency. The search there was

identified as an " 'exception' to the general rule that '[i]n cases where the securing of a warrant is reasonably practicable, it must be used' " (456 U.S. at 807, quoting *Carroll* v. *United States*, 267 U.S. 132, 156 (1925)). Accordingly, the Court recognized that police are permitted to search an automobile without a warrant when it has been secured at the station as well as when it is seized on the street; a contrary rule would impose a significant cost on the police without achieving any substantial protection of privacy interests (since it would usually simply lead to a search on the street). 456 U.S. at 807 n.9. In short, the fact that the police have probable cause to believe that a vehicle contains contraband provides a basis for searching it without a warrant even in the absence of any particular exigency (*ibid.*) —and *Ross* teaches that that search authority extends to the packages inside the vehicle.[6]

Respondents advance no good reason why automobile container searches should be subject to time limitations not applicable to the rest of the automobile search.[7] They

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[6]Respondents seriously miss the mark in attempting to analogize this case to searches incident to arrest or entries to determine the cause of a fire (see Br. 18-19). The searches in those cases are not exceptions to the warrant requirement in the sense that they permit warrantless searches based on probable cause; they are exceptions to the *probable cause* requirement that are permitted in certain special situations. When the reason justifying the search is gone, *i.e.*, when the potential danger to the arresting officers or from the fire has passed, there is no longer a basis for a search or entry. Here, however, the probable cause that forms the justification for the search still exists after the vehicle has been secured, and it is that probable cause that provides a basis for searching the vehicle or a container found inside. See *Ross*, 456 U.S. at 807 n.9.

[7]Respondents explicitly eschew reliance on the fact that the packages apparently were no longer in the trucks when they were opened (see Br. 34-35). As explained in our opening brief (at 31-35), such a contention would be untenable, since it is to be expected that in almost every case a container would be removed from an automobile before it is searched.

contend (Br. 25-26) that the interest in having a "bright line rule" to guide law enforcement officers argues in favor of their position here. This contention is difficult to understand. The government's suggested rule is simple and easy to apply; auto container searches should be treated the same as other automobile searches, in accordance with the rationale and apparent dictates of *Ross*. But respondents argue for anything but a bright line; they concede that containers in automobiles may be searched without a warrant when first seized or after a delay of "a few hours," but not after it becomes "practicable to obtain a warrant" (Br. 26).

Basically, respondents suggest that *Ross* has little, if any, independent significance apart from restating the rule that exigent circumstances can excuse the warrant requirement; that suggestion is contrary to the clear import of *Ross*. See especially 456 U.S. at 807 n.9. Indeed, the Court in *Ross* specifically noted that it was setting forth a general rule that "may appear unsatisfactory" in a particular case, such as one where a warrant feasibly could be obtained (*ibid.*).[8]

Finally, respondents fail to explain how their expectation of privacy in the bales of marijuana could possibly have increased after the bales were seized by the police (see Br. 29). Because the packages were present in a vehicle, respondents had a reduced expectation of privacy in them that allowed them to be searched on the basis of probable

[8]Respondents correctly note (Br. 25) that one practical reason given by the Court in *Ross* for its holding — that requiring a warrant for a container search would delay completion of the automobile search (see 456 U.S. at 821 n.28) — no longer obtains when the search is substantially delayed. But this practical consideration was tangential to the decision in *Ross*, which was based primarily on the rationale that the scope of the automobile search should extend as far as the probable cause that justifies it, just as if a search warrant had been issued by a magistrate.

cause without a warrant. Since the packages remained in unaltered condition between seizure and search, and since respondents did not even know how rapidly the packages would be searched, we cannot comprehend how the period of delay could have any bearing upon either respondents' objective or subjective expectations of privacy in their contents.[9]

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[9]Respondents' reliance (Br. 31-32) on *United States* v. *Place*, 462 U.S. 696 (1983), and the dissent in *Segura* v. *United States*, No. 82-5298 (July 5, 1984), is misplaced. Those opinions recognize that a lawful seizure at some point may become unreasonable because of its duration. That is because it represents an unreasonable interference with an individual's lawful *possessory* interest, not because of any invasion of privacy. Even if that principle were applicable here, three days is surely not an unreasonable length of time to hold plastic-wrapped packages reeking of marijuana on the basis of probable cause. Compare *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970) (mail held 29 hours on basis of reasonable suspicion). (The 90-minute limit in *Place* is inapposite here because that seizure was predicated only on reasonable suspicion.) Moreover, the question of an unreasonably long dispossession does not even arise here because the police had no reason to believe that respondents had any lawful possessory interest in the seized bales. Unlike the suitcase in *Place* and the apartment in *Segura*, the seized bales appeared to be nothing more than forfeitable contraband, and respondents did not assert to the officers that they had any lawful interest in the bales and wanted them returned. They had no right, of course, to return of the contraband. The fact that they asserted an interest in the marijuana sufficient to confer "standing" (see Resp. Br. 32 n.13) does not give respondents any reason to complain that the length of the seizure unreasonably deprived them of their property.

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